

## Appendix B

# The Law in Stability Operations and Support Operations

B-1. Law, regulation, and policy closely control the actions of the armed forces. Military forces rely on a declaration of war, an executive order, or other legal authority to direct their action. Congress must also appropriate funds. Commanders and staff officers must look closely at the law to see whether an action being considered is allowed. The rules vary by time and place; what can be done under some circumstances is forbidden in others. When the time for execution comes, Army forces must look at the policies prescribed by law and regulation and conduct operations within these rules.

B-2. This manual views laws and regulations in two ways. First, it considers the laws prevailing at the time of its writing and attempts to explain some of the more important ones. It does not attempt a definitive explanation of the law; readers should look to their staff judge advocates (SJAs) for that. Second, it anticipates that laws and regulations will grant authority necessary to conduct future operations effectively. Laws will define policy and convey specific instructions and authority to military forces to accomplish their mission.

B-3. Consideration of current law introduces the problem of terms of art. These legal terms have meaning under particular circumstances and, in specific contexts, are restricted to some special case of their meaning in ordinary language. Thus, humanitarian assistance means, in ordinary English, any help given by any person to any other person in need. It is motivated by sympathy for human suffering or hardship. This manual uses the term in its ordinary sense. On the other hand, under the authority of Title 10 United States (US) Code (USC), section 401, certain civil-military operations overseas are known as humanitarian and civic assistance. Generally, this manual does not use such terms except when dealing specifically with legal matters. When it does use them, it explains them in context.

## APPLICABLE BODIES OF LAW

B-4. Three bodies of law are relevant to the conduct of US military operations in peace and conflict: international law, US law, and host-nation law. In

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addition to this appendix, FM 1-04 has specific legal guidelines for stability operations and support operations.

## INTERNATIONAL LAW

B-5. International law affects most stability operations and support operations. International law consists mainly of international agreements, such as treaties and customary international law, which includes the agreements and customary law known as the law of war. International agreements prescribe the rights, duties, powers, and privileges of nations relative to particular undertakings. International agreements affect US participation in stability operations and support operations in matters such as—

- The use of force during armed conflict.
- The right of entry of US forces into a foreign country.
- The status of US personnel in the foreign country.
- Construction and operation of US bases.
- Aircraft overflight and landing rights.
- The processing of claims for damage to persons and property.
- The support provided to other armed forces, nongovernmental organizations (NGOs), and local populace.

B-6. The military planner must understand that such agreements or customary international law may govern all aspects of operations carried out in a foreign country. In the absence of a viable host nation's existing domestic law or an appropriate international agreement, aspects of the operations may be controlled by customary international law. In addition, US law and regulation will govern the conduct of such operations.

## US LAW

B-7. Operations in peace and conflict must comply with US law, whether as a statute, executive order, regulation, or other directive from a branch or agency of the federal government. The Uniform Code of Military Justice (UCMJ) applies to questions of military justice. The Federal Acquisition Regulation and various statutes govern acquisition of supplies and services for US forces. The Foreign Assistance Act and the Arms Export Control Act pertain to aid given to a foreign country. Various statutes, Executive Order (EO) 12333, and Department of Defense (DOD) and service regulations govern intelligence activities. The Case Act and implementing directives govern the negotiation and conclusion of international agreements. The SJA must actively advise and participate in every stage of the operation, from the initial planning to redeployment.

## HOST-NATION LAW

B-8. If a viable host-nation government exists, whether at the national or the local level, domestic laws of the host nation may apply to US forces in that country unless an international agreement provides otherwise. Examples of laws that may inhibit US operations include the fields of immigration, labor, currency exchange, procurement of goods and services, customs and taxes, and criminal and civil liability. A status-of-forces agreement (SOFA) between the US and the host nation may cover these areas during the period of an

operation. Therefore, planners must understand the law to assess whether and how it will adversely affect the operation. Assistance may be available from the local US diplomatic mission or the command judge advocate, or the command may have to rely on other sources for guidance. If local law hinders or otherwise implicates the conduct the operation, commanders should inform the diplomatic mission and request that it negotiate a solution.

## LEGAL AND REGULATORY CONSIDERATIONS

B-9. The following considerations show the legal complexities encountered in stability operations and support operations. They provide only a starting point for planning and conducting legal operations in peace and conflict. The SJA is a critical member of the staff and must be involved with conducting all operations. The Center for Law and Military Operations provides additional resources and references for legal considerations in stability operations and support operations.

### POSSE COMITATUS ACT

B-10. Posse Comitatus Act is the popular name for the statute (Title 18 USC, section 1385) that makes it a crime to use Army forces to enforce civil law. It is the keystone of a legal philosophy that emphasizes the distinction between the military mission and that of domestic civil law enforcement. Several exceptions to the statute exist that allow, with proper authorization, military support to civilian law enforcement agencies (LEAs). The SJA must review all operations to ensure that they comply with the act. (See Chapter 6.)

### Constitutional Exceptions

B-11. Under its inherent authority, the US government must preserve public order and carry out governmental operations within its territorial limits, by force, if necessary. Under the Constitution, two exceptions allow using the military to execute or enforce the law.

**B-12. When Necessary to Protect Civilian Property and Functions.** A sudden and unexpected civil disturbance, disaster, or calamity may seriously endanger life and property and disrupt normal governmental functions to such an extent that local authorities cannot control the situation. At such times, the federal government may use military force to prevent loss of life or wanton destruction of property and to restore government functions and public order. This exception has rarely been used.

**B-13. When Necessary to Protect Federal Property and Functions.** The federal government may use military force to protect federal property and federal government functions when local authorities cannot or decline to provide adequate protection.

### Statutory Exceptions

B-14. Other statutory exceptions (Title 10 USC, sections 371-380) allow military personnel to provide limited support to civilian LEAs indirectly. Under these laws, the military may share certain information and provide equipment, facilities, and other services to LEAs. The annual National Defense Authorization Act also contains exceptions concerning military support to

civilian authorities fighting illegal drugs. DOD policies for providing support to civilian LEAs, including personnel and equipment, are contained in DOD Directive (DODD) 5525.5. AR 500-51 contains related Army policies. Examples of support that do not violate the Posse Comitatus Act include—

- Loan of equipment and training to operate or repair the equipment. Certain customs and other laws—the Controlled Substances Act and the Immigration and Nationality Act—permit direct operation of this equipment.
- Civilian LEAs' use of installation research facilities.
- Transfer of information acquired during normal military operations.
- Actions that are taken for the primary purpose of furthering a military or foreign affairs function of the US.
- Investigations and other actions related to enforcement of the UCMJ.
- Actions related to a commander's authority to maintain law and order on a military installation or facility.
- Protection of classified military information or equipment.
- When authorized by the president, prevention of loss of life or wanton destruction of property and restoration of governmental function and public order in a civil emergency.
- When authorized by the president, protection of federal property.
- Protection of the president, vice president, and other designated dignitaries.
- Execution of certain warrants relating to enforcement of specified civil rights laws.
- Support of territorial governors if a civil disorder occurs.

B-15. Note: These exceptions must meet the requirements of applicable laws and directives. In addition, there are other exceptions to the Posse Comitatus Act. (See DODD 5525.5.)

## **TITLE 10 USC**

B-16. Title 10 is the “Armed Forces” section of the USC. Chapter 18 gives basic guidance for the interaction of military, reserve component, and civilian LEAs. Guidelines on reimbursement and restrictions on directly participating in law enforcement activities, using information collected during military operations, and using military equipment and facilities are some of the topics covered. Title 10 prohibits the military from directly participating in arrests, searches, seizures, or other similar activity unless authorized by law (such as arrests on military property). The fiscal year (FY) 1989 and subsequent National Defense Authorization Acts have authorized the DOD to provide more support to LEAs in the counterdrug effort.

## **FOREIGN ASSISTANCE ACT**

B-17. “The Mansfield Amendment” to the Foreign Assistance Act (Title 22 USC, section 2291[c][1]) prohibits US personnel from performing foreign law enforcement activities overseas. Under Chapter 8 of Part I of the Foreign Assistance Act, the president may give assistance to eligible countries and international organizations for counterdrug (CD) programs. The 1978

“Kennedy Amendment” to the Foreign Assistance Act (Title 22 USC, section 2304[a][2]) prohibits foreign governments with a record of gross human rights violations from receiving security assistance funds. It also prohibits using the act to support foreign police, prisons, or intelligence operations. Occasional exceptions have been made, so the SJA must be consulted for specific situations.

## **ECONOMY ACT**

B-18. The Economy Act (Title 31 USC, section 1535) requires that other federal agencies reimburse the Department of Defense for services or support provided. Reimbursement for DOD support provided to LEAs is not required when that support—

- Is in the normal course of military training and operations.
- Results in benefit to the DOD that is substantially equivalent to that which would otherwise be obtained from military operations or training.
- Is provided under the authority of section 1004, National Defense Authorization Act for FY 1991, as amended.

## **TITLE 32 USC**

B-19. Title 32 is the “National Guard” section of the USC. Section 112 describes how the secretary of defense may provide funds to state governments (including the District of Columbia, Commonwealth of Puerto Rico, and US territories) for CD operations by the Army National Guard (ARNG) when not in federal service. The Posse Comitatus Act does not apply to troops when not in federal service. Unlike Title 10, this title does not specify how the ARNG may be employed. Each state determines its own employment laws. Nevertheless, under their regulations, members of the ARNG may not participate directly in law enforcement activities. In some cases, however, these soldiers may conduct limited law enforcement activities, such as searches of shipping containers for illegal drugs, if their state law authorizes it. For these reasons, section 112 requires that the plans submitted by the state governors to the secretary of defense specify how the ARNG personnel will provide support to LEAs.

## **APPROPRIATIONS AND AUTHORIZATION ACTS**

B-20. The yearly acts passed to authorize or appropriate funds to the DOD often contain provisions relating to the CD effort. For example, the FY 1989 National Defense Authorization Act tasked the DOD to be the single lead agency of the federal government for detecting and monitoring illegal drug shipments into the US. The FY 1990-91 National Defense Authorization Act tasked the DOD to create an integrated command, control, communications, and technical intelligence network linking the military and the various civilian LEAs. The first of these provisions was subsequently incorporated into permanent law (Title 10 USC, section 124).

## **FISCAL LAW**

B-21. Properly spending funds for operations is important. Failure to apply fiscal principles correctly to federal activities can lead to unauthorized

expenditure and potential criminal or administrative sanctions. The principles are complex; the answers cannot necessarily be derived by applying common sense rules. Funds appropriated must be used for the purpose for which they were appropriated. Additionally, funds may also have specific limitations as to activities for which they can be used. After-the-fact audits by the General Accounting Office and other agencies are common.

## EXECUTIVE ORDERS

B-22. EO 12333 regulates the use of national intelligence assets. DODD 5240.1 and DOD 5240.1-R implement for the DOD the provisions of EO 12333 and set forth the conditions under which the DOD can collect information on US persons. Under these provisions, the Department of Defense may collect information on US persons reasonably believed to be engaged in international illegal drug activities. The complexities of these provisions require full legal review of all intelligence activities in addition to prescribed intelligence oversight.

B-23. Intelligence oversight regulations contained in AR 381-10 implements EO 12333. This regulation also provides procedures on—

- Collecting, disseminating, or retaining information on US persons by intelligence components.
- Assistance by intelligence components to law enforcement.
- Reporting violations, investigating violations, and taking corrective action.

## LAW OF ARMED CONFLICT

B-24. The law of war applies to all cases of declared war or any other armed conflicts that arise between the US and other nations, even if the state of war is not recognized by one of them. It also applies to cases of partial or total occupation. Common article 2 of the Geneva Conventions discusses such occupations. Armed conflicts such as the Falklands War, the Iran-Iraq War, and Operation DESERT STORM were clearly international armed conflicts to which the law of war applied. While the 1977 Protocol I to the 1949 Geneva Conventions has expanded the application to include certain wars of “national liberation,” the US does not recognize this extension of the law of war.

B-25. In peace operations, such as those in Somalia, Haiti, and Bosnia, the question arises whether the law of war applies. The issue hinges on whether the peace operations forces undertake a combatant role. So far, the US, UN, and NATO believe that their forces have not become combatants, despite carrying out offensive-type operations, such as the use of Task Force Ranger in Somalia and Operations DENY FLIGHT and DELIBERATE FORCE in Bosnia. Although the law of war does not apply to these operations, the US, UN, and NATO have their forces apply the “principles and spirit” of the law of war in these operations.

B-26. This approach is consistent with DOD policy to comply with the law of war “in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized” (DODD 5100.77, paragraph 5.3.1). CJCSI 5810.01B, paragraph 4.a. states that the US forces

“will comply with the law of war during all armed conflicts, however such conflicts are characterized, and, unless otherwise directed by competent authorities.” In applying the DOD policy, however, allowance must be made during these operations. US forces often lack the resources to comply with the law of war to the letter. The US complies with the law of war to the extent “practicable and feasible” (memorandum of W. Hays Parks to the judge advocate general of the Army, 1 October 1990).

## **INTERNATIONAL AGREEMENTS**

B-27. Several international agreements affect stability operations and support operations. These include SOFAs, multilateral conventions, and bilateral agreements. Agreements can also be prepared for specific operations with appropriate delegated authority in accordance with DODD 5530.3 and Army regulations. SOFAs establish the legal status of military personnel in foreign countries. Criminal and civil jurisdiction, taxation, and claims for damages and injuries are a few of the topics usually covered. In the absence of an agreement or some other arrangement with a nation, DOD personnel in foreign countries have no special legal status. They become subject to all the laws and judicial processes of the host nation unless other conventions or agreements create exceptions to that rule.

## **ROBERT T. STAFFORD DISASTER RELIEF ACT**

B-28. The Stafford Act—Title 42 USC, section 121 (and following sections), as amended—is the statutory authority for federal domestic disaster assistance. It empowers the president to establish a program for disaster preparedness and response, which he delegates to the Federal Emergency Management Agency. The Stafford Act provides procedures for declaring an emergency or a major disaster, as well as the type and amount of federal assistance available. The act authorizes the president to provide DOD assets for relief once he formally declares an emergency or a major disaster. He may also provide DOD assets for emergency work on a limited basis before the declaration. DOD Directive 3025.1 contains the Department of Defense policy for providing domestic disaster assistance. AR 500-60 has the Army policy.

## **WAR POWERS RESOLUTION**

B-29. Public Law 93-148, the War Powers Resolution (WPR) of November 1973 (also called the War Powers Act), requires the president to consult with and report to Congress when introducing US armed forces—

- Into hostilities.
- Into situations where imminent involvement in hostilities is clearly indicated by the circumstances.
- Into foreign territories when equipped for combat (except for supply, repair, replacement, and training).
- In numbers that substantially increase the number of US forces equipped for combat in a foreign country.

B-30. The resolution also applies to the “assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or

government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.”

B-31. Procedures have been established for the legal advisor to the Chairman, Joint Chiefs of Staff (JCS), to review all force deployment actions routed through the JCS to which the WPR may apply. The chairman’s legal advisor subsequently reports to the DOD general counsel concerning the WPR’s applicability. If the DOD general counsel determines that the situation merits further interagency discussion, he consults with the Department of State’s legal advisor and, perhaps, with the attorney general. This process should provide the president with advice concerning the congressional consultation and reporting requirements mandated by the WPR.

B-32. Commanders and military planners should be aware that the advisory and training commitment of US forces might require review for applicability of the WPR. Advisory duties, especially in an insurgency or a counterinsurgency, may fall in the category of actions requiring consultation and reporting.

B-33. If found to be applicable, the WPR requires US forces to withdraw in 60 days of the reporting date or 90 days when the president deems it militarily necessary, unless Congress legislates otherwise.

## **CLAIMS ADMINISTRATION**

B-34. Activities of US military personnel serving in foreign countries occasionally result in personal injuries, deaths, and property damage. Also, members of the armed forces may be injured and their property damaged, lost, or destroyed. Claims against the United States that arise in foreign countries are adjudicated under several statutes and international agreements. Claims are not payable if the injury or damage occurs as a result of combat activities of the armed forces. Planning for stability operations and support operations should include efforts to have the DOD general counsel designate single-service claims responsibility for the operation. This operation should take place in a country not already assigned to a single service for claims purposes. Additionally, every effort must be made to ensure that US personnel do not leave the impression with potential claimants that their claims are payable. Only properly constituted claims commissions may make these determinations.

## **USE OF CHEMICAL HERBICIDES AND RIOT CONTROL AGENTS**

B-35. EO 11850 limits using chemical herbicides and riot control agents. The secretary of defense is tasked with taking all necessary measures to ensure that US forces use neither chemical herbicides nor riot control agents without prior presidential approval. Detailed guidance is in the Joint Strategic Capabilities Plan. Commanders should consult their SJA on implementing this executive order on a case-by-case basis.